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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1959

No. 671

THOMAS J. FITZGERALD, Trustee in Bankruptcy,
PETITIONER,

v.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, RESPONDENT.

In the Matter of
MIDYETT AND MAY CONSTRUCTION COMPANY, a partnership, consisting of Horace Leon Midyett and Ruel Farries May, Bankrupt.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1959

No. .....

THOMAS J. FITZGERALD, Trustee in Bankruptcy,
PETITIONER,

v.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, RESPONDENT.

In the Matter of
MIDYETT AND MAY CONSTRUCTION COMPANY, a partnership, consisting of Horace Leon Midyett and Ruel Farries May, Bankrupt.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

OPINION BELOW

The opinion of the United States Court of Appeals, Tenth Circuit (per Phillips, J.) (appended hereto) is reported at 272 F. 2d 121.

JURISDICTION

The judgment of the United States Court of Appeals, Tenth Circuit, was entered November 3, 1959. Jurisdiction is conferred on this Court to review the judgment of the United States Court of Appeals, Tenth Circuit, by the following statutory provisions:

> 11 U.S.C. Sec. 47(c): "The Supreme Court of the United States is vested with jurisdiction to review judgments, decrees, and orders of the United States courts of appeals in proceedings under this title in accordance with the provisions of the laws of the United States now in force or such as may hereafter be enacted."
>
> 28 U.S.C. Sec. 1254: "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"

QUESTION PRESENTED

The question presented for review is whether Section 57(i) and (n) of the Bankruptcy Act (11 U.S.C. Sec. 93 (i) and (n)) provides the measure of a surety's rights to file a contingent claim against a bankrupt's estate. If a surety files a contingent claim in its own name and right (rather than in the name and right of the creditor whose claim the surety has secured, as prescribed in the Act) may the surety after the expiration of the time for filing claims amend its contingent claim to assert it in the manner set forth in Sec. 57(i), or is such amendment barred as the then untimely assertion of a new claim?

STATUTES INVOLVED

The statutory provisions which the case involves are as follows:

11 U.S.C. Sec. 93(i), p. 1704 (1958 Ed.); (Bankruptcy Act Sec. 57(i)):

"Whenever a creditor whose claim against a bankrupt estate is secured by the individual undertaking of any person fails to prove and file such claim, such person may do so in the creditor's name and, if he discharge such undertaking in whole or in part, he shall be subrogated to that extent to the rights of the creditor."

11 U.S.C. Sec. 93 (n), p. 1704 (1958 Ed.); (Bankruptcy Act Sec. 57(n) (in part)):

"Except as otherwise provided in this title, all claims provable under this title, including all claims of the United States and of any State or subdivision thereof, shall be proved and filed in the manner provided in this section. Claims which are not filed within six months after the first date set for the first meeting of creditors shall not be allowed."

11 U.S.C. Sec. 103(a), p. 1711 (1958 Ed.); (Bankruptcy Act Sec. 63(a).) (in part):

"Debts of the bankrupt may be proved and allowed against his estate which are founded upon * * * (8) contingent debts and contingent contractual liabilities: * * *."

FACTS

The facts material to the consideration of the questions presented are as follows. References are to pages of the printed Transcript of Record used in the Circuit Court and filed with this Petition.

Midyett and May Construction Company (hereinafter, the Bankrupt) was adjudicated a bankrupt on its voluntary petition therefor in the United States District Court for the District of Colorado on March 13, 1957 (R. 1). Respondent Fidelity and Deposit Company of Maryland (hereinafter, the Surety) filed on September 26, 1957, its claim asserting that the Bankrupt had executed an Agreement of Indemnity to it on May 14, 1956 (R. 2). The Agreement of Indemnity was attached to the claim as an exhibit and recited that it was given in connection with bonds executed by the Surety on behalf of the Bankrupt, a contractor (R. 8-13).

The Surety asserted against the Bankrupt a contingent liability of $390,409.19 being the total penalty of two bonds upon which the amount due had not been ascertained (R. 2-5), and a "liquidated claim" of $24,472.86 (R. 2), being amounts theretofore paid out by the Surety under four bonds, together with expenses. All payments by the Surety under the bonds were made subsequent to the adjudication of bankruptcy (R. 2); at the date of adjudication the Surety's claim was entirely unliquidated. Upon making one such payment the Surety obtained an assignment of the claim (R. 3) which it attached to its claim (R. 6-8). The Surety's claim set forth the names of a number of creditors whom it had paid on the bonds, who had filed claims in the bankruptcy proceeding, and set forth the amounts of their claims and the amounts paid to them by the Surety (R. 2-6).

On May 21, 1958, the Surety filed an amended claim, alleging that its claim had become "liquidated" in the total sum of $74,713.07 (R. 14), and setting forth the amounts paid, with expenses, on each of the bonds. As in the original claim, names of certain creditors, who had filed claims in the bankruptcy proceeding were set forth

together with amount of claim and amount paid to each by the Surety (R. 14-16).

Neither the Surety's original nor amended claim disclosed whether the Surety's payments to creditors were on account of the same debts reflected by those creditors' claims in bankruptcy. The Surety stated in its original claim that the principal creditors' claims "apparently" contained claims for amounts which were subsequently paid by the surety (R. 2-6), but no such statement was made in the amended claim (R. 13-16). Six of the seven principal creditors' claims cited in the Surety's amended claim varied in amount from the amount paid to them by the Surety (R. 14-16).

Thomas J. FitzGerald, the Trustee in Bankruptcy (hereinafter, the Trustee), filed objection to the allowance of the Surety's amended claim, asserting *inter alia* that the claim was not filed in the names of those claimants to whom the Surety had made payments "as is required by Section 57(i)" of the Bankruptcy Act (R. 17).

The Referee in Bankruptcy allowed the Surety's amended claim only as to the total expenses claimed, $5,544.41, and as to the one claim of which an assignment was received (R. 19-20). The remainder of the amended claim was disallowed "for lack of compliance with the provisions of Section 57(i) of the Bankruptcy Act" (R. 20). The Referee also ordered "That the oral motion of the claimant for leave to amend be and it is denied, for that the proposed amendment would not in fact be an amendment but the assertion of a new claim or claims after the time for filing claims has elapsed" (R. 20).

Petition for review was filed by the Surety (R. 17-19). The District Court affirmed the order of the Referee and denied the petition for review (R. 21). The Surety appealed to the Court of Appeals (R. 21). The Court of

Appeals held that the Surety might amend its claim; reversed the order of the District Court and remanded for further proceedings in accordance with the views expressed in the opinion of the Court.

ARGUMENT

The decision by the Court of Appeals conflicts with a decision of this Court and with decisions of Courts of Appeals in other circuits. It is clear that the claims filed by the Surety did not comply with 11 U.S.C. Sec. 93(i), Bankruptcy Act Sec. 57(i). This was recognized in the opinion below, where it was said at page 128:

> "* * * Moreover, the claims of Fidelity Company on its contingent liability for the bankrupt, as surety . . . should have been filed in the names of the creditors, and only where such creditors' names were unknown to Fidelity Company should they have been filed in the name of Fidelity Company . . ."

and again at pages 128-129:

> "Moreover, claims predicated on such payments should have been filed only where the creditor had not filed a claim for a debt which Fidelity Company had discharged in whole or in part. That, we think, is the clear intendment of §57, sub. i, supra."

The issue thus is: May the surety nevertheless amend after the expiration of the six-month period, to claim in the name and right of the various principal creditors, some of whom also filed claims in the bankruptcy proceeding? It is on this question that the decision below conflicts with decisions in other circuits and with *Hutchinson v. Otis, Wilcox & Co.*, 190 U.S. 552, 23 S. Ct. 778 (1903).

It is unquestioned that new claims cannot be filed after the six months' period following the first meeting of credi-

tors,-11 U.S.C. (Sec. 93(n), Bankruptcy Act Sec. 57(n). *In re Lago*, 38 F. 2d 881 (S.D.N.Y. 1929); *Tarbell v. Crex Carpet Co.*, 90 F. 2d 683 (8th Cir. 1937); *See, In re Brill*, (S.D.N.Y.) 52 F. 2d 636, 637 *aff'd.*, 52 F. 2d 639 (2d Cir. 1931):

> "This is a statute of limitations. It is even more. It is a prohibition. It is peremptory."

In *Hutchinson v. Otis, Wilcox & Co., supra*, this Court established the rule that amendment of a defective claim in bankruptcy after the statutory period is permissible so long as "the claim upon which the original proof was made is the same as that ultimately proved" (190 U.S. 555, 23 S. Ct. 778). An analogy was drawn to ". . . the allowance of an amendment setting up the same cause of action after the statute of limitations has run, when the original declaration was bad." *Ibid.*

The rule of *Hutchinson v. Otis, Wilcox & Co.* has been codified in Rule 15(c) of the Federal Rules of Civil Procedure, which has a qualified applicability to bankruptcy proceedings by virtue of General Order No. 37, 11 U.S.C. foll. Sec. 53.

The decision below expands the concept of "relation back" of amendments far beyond the scope intended by *Hutchinson v. Otis, Wilcox & Co.* and F.R.C.P. 15(c). In so doing it also conflicts with decisions in other circuits.

Both the original and first amended claims in this case were predicated on a direct claim for indemnity by the Surety against the Bankrupt (R. 2-6; 13-16). This is clear from the language of the claims and from the fact that the Surety cited the Agreement of Indemnity as "the consideration of the liability" (R. 3; 14). Moreover, the Surety attached to its claim the original of the indemnity agree-

ment, presumably in compliance with 11 U.S.C. Sec. 93(b), Bankruptcy Act Sec. 57(b) which provides in part:

> "Whenever a claim is *founded upon* an instrument of writing, such instrument, unless lost or destroyed, shall be filed with the proof of claim. * * *" (Emphasis added.)

After the Referee had ruled that the assertion of such a direct claim was improper (R. 19-20), the Surety sought to amend to assert derivatively the only kind of claim it properly could; that is, the claim of a creditor of the Bankrupt, (e.g. materialman, subcontractor), which the Surety claimed by subrogation upon making payment to the creditor.

These two claims, (1) of the Surety for indemnity and (2) of a materialman or subcontractor, for goods and services are entirely different. They are founded upon different legal theories; require proof of different sets of facts; and involve different possible defenses.

Yet the Court of Appeals characterized the Surety's claim as "imperfect" (272 F. 2d at 128) and permitted the Surety to amend for "amplification and greater certainty and specificity" *Ibid.* On analogy to cases holding that a substitution as party plaintiff of one having the legal right to sue does not change the cause of action, the Court held that the amendment sought here would not change the claim, would relate back and would not violate the six-month rule, and

> ". . . would merely be the substitution of the claimant having the legal right to sue in place of Fidelity Company . . ." (272 F. 2d at 130).

This is not the law as established by this Court and in other circuits. The amended claim permitted here changes not only the party plaintiff and the amount claimed, but also

changes the theory of recovery, and is based upon facts completely extraneous to the transaction involved in the original and first amended claims.

It is true that under F.R.C.P. 15(c) an amendment changing the legal capacity in which plaintiff sues, the amount of recovery, or the theory of recovery is held in most cases not to change the cause of action. (But see occasional cases *contra*, cited in 3 Moore's Federal Practice (2d Ed. 1948) Par. 15.15). However, it is universally held in applying Rule 15(c) that an amendment which brings into question a new transaction or occurrence, not involved in the former pleading, states a new cause of action and does not relate back so as to avoid a statute of limitations. *Glint Factors, Inc. v. Schnapp*, 126 F. 2d 207 (2nd Cir. 1942).

The decision below is *contra* to *Matter of G. L. Miller & Co. Inc.*, 45 F. 2d 115 (2d Cir. 1930). In the instant case the Surety's first claim was based on the Bankrupt's agreement of indemnity, while the claim it seeks to assert now is for goods sold and services rendered. *Miller* is the mirror image of the instant case. In *Miller* the surety's first claim was for money paid to the bankrupt for the purpose of paying principal and interest on bonds which the surety had guaranteed. After the six month period the surety sought to amend to base the claim on the bankrupt's written agreement of indemnity.

The Second Circuit (per Swan, J.) held (45 F. 2d at 116):

> "It is clear that this is an entirely different cause of action from that alleged in the original claim. The obligation there asserted was for money had and received by the bankrupt for the use of appellant or of persons to whose rights appellant was subrogated. The obligation now asserted is upon an express agree-

ment of indemnity of which there was no mention in the original claim."

The decision below is also *contra* to *C.I.T. Corp v. Himes*, 98 F. 2d 589 (3rd Cir.) *aff'ng. In Re Keck*, 23 F. Supp. 121 (W.D. Pa. 1938), *cert. den.* 305 U.S. 646, 59 S. Ct. 148 (1938). There, the proof of claim by *C.I.T.* showed only a partnership obligation. After the expiration of the six-month period *C.I.T.* sought to amend to show claims against the bankrupt individual partners on their guaranties of the partnership obligation. In denying permission to amend, the District Court pointed out that:

> ". . . the claim against the individuals upon which the C.I.T. Corporation relies is founded upon a written guaranty by each partner. The claim as filed makes no mention of any such instrument. Section 57(b) of the Bankruptcy Act, 11 U.S.C.A. Sec. 93(b) provides: 'Whenever a claim is founded upon an instrument of writing, such instrument, unless lost or destroyed, shall be filed with the proof of claim.' To effectuate any amendment of claim the guaranty would have to be filed. An effective amendment would in reality be a new claim, invalid under Section 57(n) . . ." (23 F. Supp. 122)

The Court of Appeals for the Third Circuit affirmed, quoting the above passages.

Miller and *Himes* are indistinguishable from the instant case. In *Miller* the initial claim was for money had and received, and the tardy amendment was based on an indemnity. In *Himes* the original claim was on a contract obligation and the tardy amendment on a guaranty. Here the initial claim was on indemnity and the amendment is for goods sold and services rendered. In *Himes* the court specifically noted the indispensability to the guaranty cause of action of the written instrument and its immateriality

to the contract claim; the same factor is present here, for the indemnity agreement is essential to the Surety's original claim and irrelevant to the claim in issue.

This Court should hear and decide this case because the question is of considerable importance in the day-to-day administration of the Bankruptcy Act, has recurred frequently, and is the subject of considerable conflict among lower courts.[1] These factors should impel this Court to grant certiorari, as in *C.I.R. v. Glenshaw Glass Co.*, 348 U.S. 426, 75 S. Ct. 473 (1955) and *U.S. v. Leslie Salt Co.*, 350 U.S. 383, 76 S. Ct. 416 (1956).

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[1]Cases in accord with **Miller** and **Himes** are as follows: **Dworsky v. Allanjay Bias Binding Corp.**, 182 F. 2d 803 (2d Cir. 1950) (**re:** relation back of involuntary petition in bankruptcy; the court said: ". . . look only to the petition and proposed amendment to determine whether . . . they disclose on their face that in the original petition the creditors set forth, or attempted to set forth, the same preferential transfer or transfers ultimately relied upon."); **In re Leonard**, 71 F. 2d 483 (9th Cir. 1934) (may not amend reclamation petition to include proceeds of other stock sold by bankrupt's pledgee); **In re Kemper**, 142 Fed. 210 (N.D. Iowa 1905) (may not amend to add $2,200 of debt recovered by trustee as preference); **Wheeling Valley Coal Corp. v. Mead**, 171 F. 2d 916 (4th Cir. 1949) (may not amend claim based on receiver's operation of mine to include obligations incurred by bankrupt before receiver appointed); **Matter of John C. Grennell Paint Store**, 92 F. 2d 1006 (2d Cir. 1937) (following **Miller**); **In re Haithcock**, 165 F. Supp. 182 (M.D. N.C. 1958) (amended claim indicated a new theory was asserted and a new cause of action involved); **In re Starks**, 55 F. Supp. 66 (E.D. Pa. 1944) (may not amend original claim for debt to assert claim for an accounting); **In re Ealy**, 31 F. 2d 314 (D. Mich. 1929) (may not amend claim against partnership to ". . . introduce new written instruments establishing entirely different obligations of an entirely different kind and class . . . ; i.e., claim against individual partners"). **See, In re Rothert**, 61 F. 2d 1 (7th Cir. 1932) (held no new claim because "sustainable by the same evidence"); **In re Atlantic, Gulf & Pacific SS Corp.**, 26 F. 2d 751 (D. Md. 1928) (held, no change of claim between original secured claim and amended unsecured claim because original showed "existence, nature and amount of claim."); **Continental Motors Corp. v. Morris**, 169 F. 2d 315 (10th Cir. 1948) (held, may amend to change amount of claim; **dictum** ". . . what the statute

Conflict among the rules in the various circuits is particularly unfortunate in the field of bankruptcy, where the policy of uniformity is embodied in the Constitution by Article I Section 8:

> "The Congress shall have power . . . to establish . . . uniform laws on the subject of bankruptcies throughout the United States;"

Moreover, if amendment is to be permitted with the freedom evidenced in this case, the six months statute of limitations will be greatly weakened or nullified. Administration of bankruptcy estates is a tortuous process as is; vitality must be retained in those provisions which discourage the otherwise inevitable prognostication by participants. That these considerations are significant is evidenced by this Court's promulgation of General Order 37, pursuant to the authority granted by 11 U.S.C. Sec. 53, Bankruptcy Act Sec. 30:

> "In proceedings under the Act the Rules of Civil Procedure for the District Courts of the United States

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[1](continued)
nterdicts is setting up a new ground on which the claimant seeks to recover . . . ").

Cases in accord with the approach taken in the instant case are as follows: **Menick v. Hoffman,** 205 F. 2d 365 (9th Cir. 1953) (U.S. may amend to include tax claims for additional years); **United States v. Roth,** 164 F. 2d 575 (2d Cir. 1948) (same; wrong year named through clerical error); **Industrial Commissioner v. Schneider,** 162 F. 2d 847 (2d Cir. 1947) (same; State may amend tentative claim for unemployment insurance taxes to include other quarters; though assessed quarterly, liability under state statute was indivisible.); **In re Parchem,** 166 F. Supp. 724 (D. Minn. 1958) (same); **In re Supreme Appliance & Heating Co.,** 100 F. Supp. 200 (W.D. Ky. 1951) (surety, assignee of record of unsecured claims timely filed by bankrupt's creditors, permitted to amend creditors' claims to assert for its own benefit security which creditors had not claimed.) **See, In re Lipman,** 65 F. 2d 366 (2d Cir. 1933) (". . . if it appears anywhere in the record . . . that a person has a claim . . . he may amend."); **Scottsville National Bank v. Gilmer,** 37 F. 2d 227 (4th Cir. 1930) (same).

shall, in so far as they are not inconsistent with the Act or with these general orders, be followed as nearly as may be. *But the court may shorten the limitations of time prescribed so as to expedite hearings,* and may otherwise modify the rules for the preparation or hearing of any particular proceeding." (Emphasis added.)

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 6167 — September Term, 1959

Fidelity and Deposit Company of Maryland,
Appellant,
v.
Thomas J. FitzGerald, Trustee in Bankruptcy,
Appellee.
In the Matter of Midyett and May Construction Company, a partnership, consisting of Horace Leon Midyett and Ruel Farries May, Bankrupt.

Appeal from the United States District Court for the District of Colorado.

Filed U. S. Court of Appeals, Tenth Circuit, Nov. 3, 1959. Robert B. Cartwright, Clerk.

R. Gayle Weller (John R. Hickisch was with him on the brief) for appellant.

John W. Low for appellee.

Before Murrah, Chief Judge, and Phillips and Lewis, Circuit Judges.

Phillips, Circuit Judge.

This is an appeal from an order of the United States District Court for the District of Colorado, affirming on a

petition for review, an order of the referee denying in part the amended claim of Fidelity and Deposit Company of Maryland, hereinafter called Fidelity Company, filed against the estate of Midyett and May Construction Company, a partnership, Bankrupt, hereinafter referred to either as the Construction Company or the Bankrupt.

The Construction Company was adjudged a bankrupt on March 13, 1957. Prior to bankruptcy, the Construction Company had engaged in the construction business and had entered into a number of construction contracts. In connection with each of such contracts, the Construction Company, as principal, and Fidelity Company, as surety, executed and delivered to the owner, the other party to the construction contract, a performance bond.

On September 13, 1956, the Construction Company executed and delivered to Fidelity Company a contract collateral to such performance bond contracts, in which the Construction Company agreed to indemnify and save Fidelity Company harmless from and against any loss, cost, liability or expense which Fidelity Company should at any time sustain or incur in consequence of such performance bonds.

Within the six-month period "after the first date set for the first meeting of creditors" (11 U.S.C.A. §93(n)), Fidelity Company filed its original unsecured claim, in part a contingent liability claim and in part a liquidated surety claim. See Note 1, below.

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[1]In its original claim Fidelity Company alleged that at and before the filing of the petition in bankruptcy, the Construction Company was justly and truly liable to the Fidelity Company in the sum of $390,409.19, as a contingent liability, and that the Bankrupt was now indebted to the Fidelity Company in the sum of $24,472.86, as a liquidated claim, and $226,220.93 on a contingent contractual liability claim. It further set out in the claim

After the expiration of the six-month period and on May 21, 1958, Fidelity Company filed its amended claim in which it alleged:

"2. That * * * the above-named bankrupt was at and before the filing by it of its petition for adjudication of bankruptcy justly and truly liable to * * * Fidelity * * * Company * * * in the sum of $390,409.19 as a contingent liability; that * * * bankrupt is now indebted to * * * Fidelity * * * Company * * * in the sum of $74,713.07 as a liquidated claim.

* * * * *

"B. That on or about May 14, 1956, * * * Fidelity * * * Company * * * as surety executed a bond in the amount of $85,089.00 to the School District No. 50 Adams County, Westminster, Colorado, wherein the bankrupt was principal, that under the said bond

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[1](continued)

"B. That on or about May 14, 1956 . . . Fidelity . . . Company . . . as surety executed a bond in the amount of $85,089.00 to the School District No. 50, Adams County, Westminster, Colorado, wherein the bankrupt was principal, that under the said bond . . . Fidelity . . . Company as surety became obligated to pay and did pay $5,083.07, that in addition the said surety incurred expenses in the amount of $487.74.

"C. That on or about May 15, 1956, . . . Fidelity . . . Company . . . as surety executed a bond in the amount of $19,956.00 to the Continental Oil Company wherein the bankrupt was principal. That under the said bond . . . Fidelity . . . Company as surety became obligated to pay and did pay $1,276.00, that in addition the said surety incurred expenses in the amount of $75.00, that there is attached hereto an executed copy of affidavit of assignment with regard to the payment as made under the bond to the Denver Glass Company.

"D. That on or about May 24, 1956 . . . Fidelity . . . Company . . . as surety executed a bond in the amount of $90,824.00 to the Board of Education, School District No. 6, Arapahoe County, Colorado, wherein the bankrupt was principal, that some claims have been paid, but the obligee still has a claim which has not been settled, that the total amount due under the bond cannot be

* * * Fidelity * * * Company as surety became obligated to pay and did pay $5,083.07, that in addition the said surety incurred and paid expenses in the amount of $487.74.

"C. That on or about May 15, 1956 * * * Fidelity * * * Company * * * as surety executed a bond in the amount of $19,956.00 to the Continental Oil Company wherein the bankrupt was principal. That

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[1](continued)
ascertained and therefore this portion of the claim of . . . Fidelity . . . Company . . . is a contingent contractual liability in the amount of $90,824.00.

E. That on or about July 30, 1956 . . . Fidelity . . . Company . . . as surety executed a bond in the amount of $34,143.26 to the Denver Methodist Church Extension Society and the Thornton Methodist Church, wherein the bankrupt was principal. That under the said bond . . . Fidelity . . . Company as surety became obligated to pay and did pay $11,626.50, that in addition the said surety incurred expenses in the amount of $951.60, that one of the claims . . . paid was the Arvada Lumber Company in the amount of $7.89, that the said Arvada Lumber Company has filed a claim, being Claim Number 8, in the amount of $111.03, that a portion of the Arvada Lumber Company's claim apparently was for the amount subsequently paid by . . . Fidelity . . . Company . . . That one of the claims . . . paid was Stephan Dach in the amount of $600.00, that Stephan Dach has filed a claim in this bankruptcy estate, being Claim Number 19, in the amount of $2,388.77, that the said claim of Stephan Dach apparently contains a claim for the amount which was subsequently paid by . . . Fidelity . . . Company . . . That one of the claims . . . paid was the Barnett Company in the amount of $52.50, that the Barnett Company has filed a claim in this bankruptcy estate, being Claim Number 28, for the amount of $52.50 . . . That one of the claims . . . paid was Kitchen Distributors, Inc. in the amount of $28.15, that Kitchen Distributors, Inc. has filed a claim in said bankruptcy estate, being Claim Number 41, in the amount of $272.97, that the said claim of Kitchen Distributors, Inc. apparently contains a claim for the amount which was subsequently paid by . . . Fidelity . . . Company . . .

F. That on or about October 24, 1956, . . . Fidelity . . . Company . . . as surety executed a bond in the amount of $25,000.00 to the Harvey Park Baptist Church wherein the bankrupt was principal. That under the said bond, . . . Fidelity

under the said bond * * * Fidelity * * * Company as surety became obligated to pay and did pay $1,276.00, that in addition the said surety incurred and paid expenses in the amount of $75.00, that there was attached to the original claim an executed copy of affidavit of assignment with regard to the payment as made under the bond to the Denver Glass Company.

"D. That on or about May 24, 1956 * * * Fidelity * * * Company * * * as surety executed a bond in the

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[(continued).

Company . . . as surety became obligated to pay and did pay $5,887.95, that in addition the said surety incurred expenses in the amount of $436.00. That one of the claims . . . paid was Stephan Dach in the amount of $400.00, that . . . Dach has filed a claim in this bankruptcy estate, being Claim Number 19, in the amount of $2,388.77, that the said claim of . . . Dach apparently contains a claim for the amount which was subsequently paid by . . . Fidelity . . . Company . . . That one of the claims . . . paid was Gump Glass Company in the amount of $217.00, that the Gump Glass Company has filed a claim in this bankruptcy estate, being Claim Number 29, in the amount of $1,561.32, . . . That one of the claims paid was the Denver Hardware Co. in the amount of $592.65, that Denver Hardware Co. has filed a claim in this bankruptcy estate, being Claim Number 39 in the amount of $1,261.52, that the said claim of Denver Hardware Co. apparently contains a claim for the amount which was subsequently paid by . . . Fidelity . . . Company . . . That one of the claims . . . paid was Kitchen Distributors, Inc. in the amount of $244.82, that Kitchen Distributors, Inc. has filed a claim in this bankruptcy estate, being Claim Numbered 41, in the amount of $272.97, that the said claim of Kitchen Distributors, Inc. apparently contains a claim for the amount which has now been paid by . . . Fidelity . . . Company . . .

G. That on or about December 20, 1956 . . . Fidelity . . . Company . . . as surety executed a bond in the amount of $135,396.93 to Hod Carriers and Laborers Union No. 720 wherein the bankrupt was principal, that a claim is at present being made by the obligee, the Hod Carriers and Laborers Union No. 720, that the amount due cannot now be ascertained and therefore the claim of . . . Fidelity . . . Company . . . against the bankrupt is in the amount of $135,396.93 and is a contingent contractual liability

amount of $90,824.00 to the Board of Education, School District No. 6, Arapahoe County, Colorado, wherein the bankrupt was principal. That under the said bond * * * Fidelity * * * Company as surety became obligated to pay and did pay $14,854.74, that in addition the said surety incurred and paid expenses in the amount of $602.51. That one of the claims * * * paid was $94.61 to the Union Supply Company who has filed a claim being claim No. 24 in the amount of $94.61. That one of the claims * * * paid was $1550.27 to Stephan Dach who has filed claim No. 19 in the amount of $2388.77.

"E. That on or about July 30, 1956 * * * Fidelity * * * Company * * * as surety executed a bond in the amount of $34,143.26 to the Denver Methodist Church Extension Society and the Thornton Methodist Church, wherein the bankrupt was principal. That under the said bond * * * Fidelity * * * Company as surety became obligated to pay and did pay $11,626.50, that in addition the said surety incurred and paid expenses in the amount of $951.60, that one of the claims * * * paid was the Arvada Lumber Company in the amount of $7.89, that the said Arvada Lumber Company has filed a claim, being Claim Number 8, in the amount of $111.03. That one of the claims * * * paid was Stephan Dach in the amount of $600.00, that Stephan Dach has filed a claim in this bankruptcy estate, being Claim Number 19, in the amount of $2,388.77. That one of the claims * * * paid was the Barnett Company in the amount of $52.50, that the Barnett Company has filed a claim in this bankruptcy estate, being Claim Number 28, for the amount of $52.50. That one of the claims * * * paid was Kitchen Distributors, Inc., in the amount of $28.15, that Kitchen Distributors, Inc., has filed a claim in said bankruptcy

estate, being Claim Number 41 in the amount of $272.97.

"F. That on or about October 24, 1956 • • • Fidelity • • • Company • • • as surety executed a bond in the amount of $25,000.00 to the Harvey Park Baptist Church wherein the bankrupt was principal. That under the said bond • • • Fidelity • • • Company as surety became obligated to pay and did pay $5,887.95, that in addition the said surety incurred and paid expenses in the amount of $436.00. That one of the claims • • • paid was Stephan Dach in the amount of $400.00, that Stephan Dach has filed a claim in this bankruptcy estate, being Claim Number 19, in the amount of $2,388.77. That one of the claims • • • paid was Gump Glass Company in the amount of $217.00, that the Gump Glass Company has filed a claim in this bankruptcy estate, being Claim Number 29, in the amount of $1561.32. That one of the claims • • • paid was the Denver Hardware Co. in the amount of $592.65, that Denver Hardware Co. has filed a claim in this bankruptcy estate, being Claim Number 39 in the amount of $1261.52. That one of the claims • • • paid was Kitchen Distributors, Inc., in the amount of $244.82, that Kitchen Distributors, Inc., has filed a claim in this bankruptcy estate, being Claim Number 41, in the amount of $272.97.

"G. That on or about December 20, 1956, • • • Fidelity • • • Company • • • as surety executed a bond in the amount of $135,396.93 to Hod Carriers and Laborers Union No. 720 wherein the bankrupt was principal. That under the said bond • • • Fidelity • • • Company as surety became obligated to pay and did pay $30,440.40, that in addition the said surety incurred and paid expenses in the amount of $2991.56.

That one of the claims * * * paid was $391.50 to Caissons, Inc., who have filed Claim Number 15 in the amount of $445.50. That one of the claims * * * paid was $635.00 to Nyco who has filed Claim Number 32 in the amount of $1385.00."

In the original claim it was alleged that no part of the liability had been paid; that there were no setoffs or counterclaims to the liability; that Fidelity Company does not have any security or securities for the liability; that the liability is founded upon the indemnity agreement, a copy of which was attached to the original claim, and that such claim is unsecured. The amended claim contained substantially the same allegations.

The trustee filed objections to the allowance of the claim, as amended, on two grounds: One, that the claim was not filed in the names of the creditors to whom Fidelity Company had made payments, as required by §57(i) of the Bankruptcy Act; and Two, that the claim did not set forth with sufficient definiteness a proof of loss sufficient to constitute Fidelity Company a creditor under §57(a) of the Bankruptcy Act. Fidelity Company moved the court for leave to amend, so as to substitute as claimants, for the benefit of Fidelity Company, the creditors to whom Fidelity Company had made payments as surety under its bond, as set forth in the claims. The referee denied the motion to amend on the ground that it would set up a new claim, filed after the six-month period had elapsed.

Section 63(a) and (8) of the Bankruptcy Act, 11 U.S.C.A. 103(a) and (8) reads:

"(a) Debts of the bankrupt may be proved and allowed against his estate which are founded upon * * * (8) contingent debts and contingent contractual liabilities; * * *."

Section 57(d) of the Bankruptcy Act, 11 U.S.C.A. §93(d) provides:

"(d) Claims which have been duly proved shall be allowed upon receipt by or upon presentation to the court, unless objection to their allowance shall be made by parties in interest or unless their consideration be continued for cause by the court upon its own motion: *Provided, however,* That an unliquidated or contingent claim shall not be allowed unless liquidated or the amount thereof estimated in the manner and within the time directed by the court; and such claim shall not be allowed if the court shall determine that it is not capable of liquidation or of reasonable estimation or that such liquidation or estimation would unduly delay the administration of the estate or any proceeding under this title."

Section 57(i) of the Bankruptcy Act, 11 U.S.C.A. §93(i) reads as follows:

"(i) Whenever a creditor whose claim against a bankrupt estate is secured by the individual undertaking of any person fails to prove and file such claim, such person may do so in the creditor's name and, if he discharge such undertaking in whole or in part, he shall be subrogated to that extent to the rights of the creditor."

General Order 21(4), 11 U.S.C.A. §53 provides:

"(4) The claims of persons contingently liable for the bankrupt or debtor may be proved in the name of the creditor when known by the party contingently liable. When the name of the creditor is unknown, such claim may be proved in the name of the party contingently liable; but no dividend shall be paid upon

such claim, except upon satisfactory proof that it will diminish pro tanto the original debt."

The purposes of §57(i), supra, and of General Order 21(4) are to prevent double proof of claims and promote orderly administration in bankruptcy.

The right of Fidelity Company to assert a claim for expenses is predicated on the indemnity agreement. The expense portion of the amended claim was allowed by the referee and is not here involved.

The claim asserted in Paragraph C of the amended complaint was an assigned claim and was allowed by the referee and is not here involved.

The remaining claims of Fidelity Company were predicated on its potential or accrued rights of subrogation under §57(i), supra, together with §63(a) and (8), supra, and General Order 21(4), supra, which provide the only way in which a surety can present a claim and participate in the distribution of a bankrupt's estate.[2]

The right to subrogation under §57(i), supra, does not depend upon whether the surety pays the principal creditor before or after "the adjudication in bankruptcy." In either event, subject to the limitations in the proviso in §57(d), supra, the surety is entitled to subrogation.[3]

The allegations of Fidelity Company's claims, predicated on contingent liability, were imperfect and required amplification and greater certainty and specificity. Moreover, the claims of Fidelity Company on its contingent liability for the bankrupt, as surety on the performance bonds, to the bankrupt's creditors under such bonds, to the extent that such creditors were known by Fidelity

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[2]Remington on Bankruptcy (Henderson), Vol. 2, §837, pp. 256, 257;

J. S. Farming Co. v. Brannon, 6 Cir., 263 F. 891.

[3]Allen v. See, 10 Cir., 196 F. 2d 608, 610

Company, should have been filed in the names of the creditors, and only where such creditors' names were unknown to Fidelity Company should they have been filed in the name of Fidelity Company. However, sufficient facts were averred in the claims predicated on contingent liability to show that Fidelity Company would be entitled, if and when and to the extent it discharged in whole or in part its liability as surety on such bonds to creditors of the bankrupt, to be subrogated, both under the provisions of 57(i), supra, and the equitable principles of subrogation, to the rights of such creditors of the bankrupt.

The allegations of Fidelity Company's claims predicated on payments it had made for the bankrupt, as surety on the performance bonds, to the bankrupt's creditors were likewise imperfect and required amplification and greater certainty and specificity. Moreover, claims predicated on such payments should have been filed only where the creditor had not filed a claim for a debt which Fidelity Company had discharged in whole or in part. That, we think, is the clear intendment of 57(i), supra.

However, where such a payment was made, after the filing of the contingent claim, to a creditor who had filed a claim, we think it was right and proper for Fidelity Company to file as a supplement to its contingent claim a verified written statement showing that it had discharged its surety obligation to the creditor in whole or in part and was entitled to be subrogated to that extent to the rights of the creditor.[1] So to do would merely establish partial liquidation of the contingent claim.

Where a creditor to whom a debt was owing by the bankrupt, for the payment of which Fidelity Company was liable as surety on one of the performance bonds, had filed

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[1]See: In the Matter of Magnus Harmonica Corporation, 3 Cir. 237 F. 2d 867, 869.

a claim for such debt and Fidelity Company had discharged such debt in whole or in part, it was not necessary for Fidelity Company to file a claim. However, if the claim filed by the creditor fails to allege the fact of the payment of the claim in whole or in part by Fidelity Company and thereby fails to show the latter's right to subrogation, Fidelity Company could, with propriety and, indeed, we think it should by appropriate action, advise the Bankruptcy Court that it had discharged the claim in full or in part and to that extent had become subrogated to the rights of the creditor.[5]

And, where, at the time of bankruptcy Fidelity Company only had a contingent claim and thereafter, within the limitations in the proviso in §57(d), discharged its liability as surety on one of the performance bonds, for a debt for which the creditor had filed a claim, we think it would be proper for Fidelity Company to take appropriate action to advise the Bankruptcy Court that it had discharged such creditor's claim in whole or in part and to the extent of such discharge was entitled to be subrogated to the rights of the creditor.

Where there is a substitution as party plaintiff or claimant of one having the legal right to sue instead of one improperly named as plaintiff or claimant and the party substituted bears some relation of interest to the original party, there is no change in the cause of action[6] and the substitution relates back to the commencement of the ac-

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[5] In the Matter of Magnus Harmonica Corporation, 3 Cir., 237 F. 2d 867, 869.

[6] New York Evening Post Co. v. Chaloner, 2 Cir., 265 F. 204, 213;
United States v. Saunders Petroleum Co., D.C.W.D. Mo., 7 F.R.D. 608, 609;
67 C.J.S. Parties §85 b., pp. 1075, 1076;
39 Am. Jur., Parties §§98, 99, pp. 967, 968;
General Order 37, 11 U.S.C.A. §53, p. 96;
Rule 15(c), Federal Rules of Civil Procedure, 28 U.S.C.A.

tion or proceeding or the filing of the claim.[7] The same result follows when an action is brought by a person who has a beneficial interest in the subject matter and the person who has the legal right to sue is substituted as suing for his use.[8]

When the substitution of a plaintiff by amendment does not change the claim or cause of action, the amendment relates back to the commencement of the action or the filing of the claim and stops the running of the statute of limitations at that point.[9]

Here, the substitution of the names of the creditors for Fidelity Company in the contingent claims would merely be the substitution of the claimant having the legal right to sue in place of Fidelity Company, and the claim would be for the benefit of Fidelity Company to the extent it should become subrogated to the rights of the creditors. Such a substitution would in nowise change the claim or cause of action and such amendment or substitution would relate back to the filing of the original claim and stop the running of the statute of limitations at that point. Likewise, the substitution for Fidelity Company, in its liquidated claims, of names of the creditors who had failed to file claims, where, as surety on the performance bonds, it

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[7] See cases cited Note 9

[8] New York Evening Post Co. v. Chaloner, 2 Cir., 265 F. 204, 213
United States v. Saunders Petroleum Co., D.C.W.D. Mo., 7 F.R.D. 608, 609;
Irving Trust Co. v. American Silk Mills, 2 Cir., 72 F. 2d 288, 290
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67 C.J.S. Parties § 85 b., pp. 1075, 1076;
39 Am. Jur., Parties §§ 98, 99, pp. 967, 968
General Order 37, 11 U.S.C.A. § 53, p. 96;
Rule 15(c), Federal Rules of Civil Procedure, 28 U.S.C.A.

[9] American Fidelity & Casr Co. v. All American Bus Lines, 10 Cir., 190 F. 2d 234, 237;
Weldon v. United States, 1 Cir., 65 F. 2d 748, 749;
54 C.J.S. Limitation of Actions § 277, p. 315

had discharged debts of the bankrupt to such creditors in whole or in part, and had thereby become entitled to rights of subrogation, would be no more than the substitution of the creditors having the legal rights to assert the claims, for Fidelity Company, which has a beneficial interest in the subject matter. Such a substitution would not change the claim or cause of action and the substitution would relate back to the date of the filing of the claim and stop the running of the statute of limitations at that point.

The Bankruptcy Court is a court of equity and endeavors to do equity and "* * * the trend of modern decisions is uniformly toward the greatest liberality in the allowance of the filing of amended proofs of claim, where there is anything in the record to justify such course of action."[10]

While the time limitation in the Bankruptcy Act for filing of creditors' claims (11 U.S.C.A. §93(n)) is "* * * construed strictly with respect to an original filing, * * * when a claim has been filed within the statutory period, an amendment thereof may be allowed after the expiration of the time for filing."[11] Such amendment may be allowed to make perfect an imperfect claim after the expiration of the six-month period. The only limitation is that the amended claim should not set up a distinctly new and different claim. A change in the amount of the claim does not make it a new and different claim.[12] The amendment relates back to the date the original claim was filed.[13]

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[10]Continental Motors Corporation v. Morris, 10 Cir., 169 F. 2d 315, 317;
Scottsville Nat. Bank v. Gilmer, 4 Cir., 37 F. 2d 227, 229

[11]In re Prindible, 3 Cir., 115 F. 2d 21, 23.

[12]Continental Motors Corporation v. Morris, 10 Cir., 169 F. 2d 315, 317.

[13]General Order 37, 11 U.S.C.A. §53, p. 96;
Rule 15(c), Federal Rules of Civil Procedure, 28 U.S.C.A.;
Superior Mfg. Corporation v. Hessler Mfg. Company, 10 Cir., 267 F. 2d 302, 304

Fidelity Company should amend its contingent claims by setting forth the dates and amounts of the performance bonds creating such contingent liability; the names of the persons to whom the bonds run; the names of the creditors to whom such contingent liability exists, if known, and if not, that fact should be stated. It should further state the amount of its contingent liability to each of such creditors, where known, and if not, that fact should be stated. It should also amend such contingent claims by substituting for its name the names of creditors, where known.

Fidelity Company should amend its liquidated claims, embraced in its original claim, for amounts paid in discharge of its surety obligation under its performance bonds to creditors who had not filed claims, by setting forth the dates and amounts of the performance bonds involved, the names of the persons to whom such bonds run, the names of the creditors to whom it made payments in discharge of its surety obligation, the amount of each payment and the fact that none of such creditors had filed a claim. It should also substitute in such liquidated claims for its name the names of the creditors to whom such payments were made.

Such amendments by Fidelity Company will merely perfect, amplify and make more specific the original claims and will not set up a new and different claim or cause of action and will be proper.[14]

In instances where there is a difference between the amount of a claim filed by a creditor and the amount of such claim which Fidelity Company asserts it has discharged as surety, such difference can be resolved by proof, and if the proof establishes errors in amounts, the claims may be amended to conform to the proof. An

[14]See: Superior Mfg. Corporation v. Hessler Mfg. Company, 10 Cir., 267 F. 2d 302, 304

amendment changing the amount of the claim does not make it a new claim and may be made after the six-month period has expired.[13]

As to whether contingent claims of Fidelity Company that have not yet been liquidated or estimated shall be allowed, when liquidated or estimated, or shall be denied because of the expiration of the time fixed by the court for such liquidation or estimation, or because the court finds they are not capable of liquidation or reasonable estimation, or because such liquidation or estimation would unduly delay the administration of the estate, we express no opinion. Those matters will be for further determination by the court.

The order of the District Court affirming the order of the referee and the order of the referee are reversed and the matter is remanded for further proceedings in accordance with the views herein expressed.

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[13] Continental Motors Corporation v. Morris, 10 Cir., 159 F. 2d 315, 316, 317

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 671

THOMAS J. FITZGERALD, Trustee in Bankruptcy
Petitioner,
vs.
FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
Respondent,

In the Matter of

MIDYETT AND MAY CONSTRUCTION COMPANY, a partnership, consisting of Horace Leon Midyett and Ruel Farries May,
Bankrupt.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

QUESTION PRESENTED

Where surety had filed in its own name a claim for indemnity against the estate of its bankrupt principal which was denied because not made in the names of bankrupt's creditors whom surety had paid, whether amendment of surety's claims by substitution of names of creditors paid would constitute amplification of an imperfect or defective claim which may be permitted after the expiration of the time for filing claims or whether such an amended claim would be the assertion of an entirely new and different claim not so permitted?

STATEMENT

As originally filed, respondent surety's claim in bankruptcy asserted a contingent liability of $390,409.19 and a liquidated claim of $24,472.86 (R. 2). The latter was the total of amounts which the surety had theretofore paid out on four bonds upon the bankrupt contractor as principal; and the former, the total penalty on two bonds upon which the amount due the obligees had not been determined at the time the claim was filed (R. 3-5).

The original filing was timely (the Court of Appeals determined it to have been within the six-month period after the first date set for the first meeting of creditors 272 F. 2d at 124).

Later, by amendment, respondent surety set forth that its claim had become liquidated in the total sum of $74,713.07, reciting some six bonds upon which respondent became surety for the bankrupt and setting forth in the case of each, the amount of money which "the Fidelity and Deposit Company as surety became obligated to pay and did pay" (R. 14-16).

No objection was made to the amendment upon the ground of its being offered too late or upon the ground that liquidation had not proceeded in good time; rather, objection was made by the Trustee in Bankruptcy upon two other grounds, the pertinent one being: "Said claim is not filed in the names of those creditors of the bankrupt to whom claimant has made payments, as is required by Section 57 (i) of the Act of Congress Relating to Bankruptcy" (R. 17).

This ground of objection was upheld by the Referee as to the bulk of respondent's claim (R. 19-20). The motion which respondent had made for leave to amend further so that the amended claim would be asserted in the names of the creditors whose claims against the bankrupt had been discharged by respondent (R. 19) was denied by the Referee. The ground of denial stated was that the proposed amendment would be the assertion of a new claim or claims after the time for filing claims had elapsed (R. 20).

The District Court denied respondent's petition for review and affirmed the order of the Referee. The Court of Appeals reversed the District Court, holding that leave should have been given respondent to amend as requested since the amendment would "be no more than the substitution of the creditors having the legal rights to assert the claims, for Fidelity Company, which has a beneficial interest in the subject matter", and that such substitution would not constitute a new and different claim. (272 F. 2d at 130).

ARGUMENT

Petitioner seems to concede that since *Hutchinson, Trustee v. Otis, Wilcox & Company*, 190 U. S. 552, it has been the rule in bankruptcy that an amended proof of a claim may be permitted after the expiration of the time for filing and proving where the claim upon which the original proof was made is the same as that ultimately proved, and notwithstanding the fact that the original claim was defective.

Likewise petitioner concedes to some extent the applicability of Rule 15 of the Federal Rules of Procedure providing that whenever the claim asserted in an amended pleading arises out of the transaction or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.[1]

Nevertheless, petitioner contends that the decision of the Court of Appeals directing that amendment be permitted is in conflict with Hutchinson and that it expands the doctrine of relation back beyond the scope intended by F.R.C.P. 15 because, says petitioner, the original claim was predicated on a direct claim for indemnity by the surety against the bankrupt, whereas the amendment asserts a claim by subrogation to the rights of creditors whom the surety paid. Petitioner's argument confuses the pleading

[1] Petitioner concedes a "qualified applicability" by virtue of General Order in Bankruptcy No 37 (11 U.S.C. foll. Sec. 53), but does not show that the qualification of the General Order, that is that the Rules be followed insofar as they are not inconsistent with the Bankruptcy Act or the General Orders, is of any consequence in the case at bar.

of legal theory with the claim itself. This test for denying amendment after the running of a period of limitation, if the theory of the cause of action be changed by the amendment, was rejected by this court in *United States v. Memphis Cotton Oil Co.*, 288 U. S. 62, as "no longer accepted as one of general validity"[2] in view of *Missouri, Kansas & Texas Ry. Co. v. Wulf*, 226 U. S. 570; *Friederichsen v. Renard*, 247 U. S. 207, and *New York Central Railroad Co. v. Kinney*, 260 U. S. 340.

Permitting a recovery for damages under contract although the complaint alleged tort, Judge Yankwich, in *Nester v. Western Union Telegraph Co.*, 25 F. Supp. 478, aff'd. 106 F. 2d 587, reversed on other grounds, 309 U.S. 582, referred to *United States v. Memphis Cotton Oil Co.*, supra, and, pointing out that the liberality of its doctrine is carried over into the Federal Rules of Civil Procedure and broadened, stated "Differences in the forms of claims being abolished, the plaintiff should be denied relief only when, under the facts proved he is entitled to none."[3] In similar fashion it has been held uniformly under the Rules that the complaint is not to be dismissed, or amendment denied, because the plaintiff's lawyer has misconceived the proper legal theory of the claim.[4]

The decision of the Court of Appeals herein not only does not conflict with the decision of this Court in Hutchinson, it does not conflict with any decisions of other circuits. Petitioner overlooks the fact that respondent's claim described in detail the facts giving rise to the claim, that $74,713.07 thereof arose out of payments that respondent had become obligated to pay *as surety* and did so pay. Whether respondent relied upon the express agreement of

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[2] 288 U. S. at 68.

[3] 25 F. Supp. at 481.

[4] See *Dotschay v. National Mutual Ins. Co.*, 5 Cir., 246 F. 2d 221, opinion of Judge Clark in *United States v. Pape*, 2 Cir., 144 F. 2d 778 (a criminal case) at 781; *Cohen v. Randall*, 2 Cir., 137 F. 2d 441, at 444, concurring opinion of Judge Clark in *Atwater v. North American Coal Corp.*, 2 Cir., 111 F. 2d 125, at 126; *Keiser v. Wait*, D. of C., 118 F. 2d 13.

its principal to indemnify the surety, upon the agreement of indemnity that the law implies,[5] or upon its right of subrogation to claims of creditors,[6] the evidence to prove the claim would be that of the payments the surety had made to creditors, and those payments furnished the consideration for the claim. It would be grossly unjust if petitioner Trustee should be permitted to cause the rejection of respondent surety's claim upon his objection that the claim was a 57-(i) claim by a surety to subrogation and therefore must be made in the names of creditors (R. 17) and should also be permitted to cause the rejection of the surety's request to amend upon the objection now asserted by petitioner that the claim was not one of subrogation at all.

The Trustee can not have it both ways as suits his convenience. His misapprehension pointed out above results in the erroneous assertion that the decision of the Court of Appeals below conflicts with others, relying principally upon *Glint Factors, Inc. v. Schnapp*, 2 Cir., 126 F. 2d 207, *Matter of G. L. Miller & Co. Inc.*, 2 Cir., 45 F. 2d 115 and *C.I.T. Corp. v. Himes*, 3 Cir., 98 F. 2d 589, cert. den. 305 U. S. 646. Glint Factors involved neither a claim nor a limitation period but rather had to do with whether preferences alleged by the petitioning creditor were sufficiently identified with those more definitely asserted by amendment to permit the amendment, and held that under F.R.C.P. 15 the amendment was allowable. Matter of Miller has a superfluous resemblance to the case at bar in that the claimant sought by amendment to assert a claim based upon an indemnity agreement. However, the ground for denial of the amendment was not that it asserted indemnity but that in the original claim there was nothing to indicate that claimant was surety as to the particular items asserted by amendment and that the amendment related to entirely different transactions. In view of this the Court stated that it need not consider the question which is involved in the case at bar, that is, whether the names of creditors paid by the

[5] 50 Am. Jur. 1049 Sec. 221 and cases there cited

[6] Sec. 57 (i) of Bankruptcy Act, 11 U.S.C. Sec. 93 (i)

surety could be added after the expiration of the period for proving claims. Himes merely prevented the assertion of a new and different claim on a written guaranty not asserted in the original claim.

Petitioner's footnote cases asserted to be contrary to the opinion below are disclosed by his own explanation to be neither in point with, nor contrary to, the case at bar. The only 57 (i) case cited is Matter of Miller, supra, which expressly did not pass upon the question involved here. The only 57 (i) cases involving amendment that we have found are in accord with the decision below. Thus, in *In re Boggs-Rice Co., Inc., Athens Stove Works v. Fleming*, 4 F. Supp. 431 (reversed on other grounds, 66 F. 2d 855), the District Court for the Western District, Virginia, held that the error of the surety in failing to file proof of claim in the names of creditors paid could be cured by amendment; *In re Salvator Brewing Co.*, 2 Cir., 193 F. 989 approved action of the district court permitting amendment where one endorser had filed proof of debt on behalf of several; and in *Insley v. Garside*, 9 Cir., 121 F. 699; on rehearing 123 F. 78, where the original opinion denied the claim of the sureties for failure to comply with Section 57 (i), on rehearing the district court was directed to give effect to the proof as a claim proven in the name of the creditor and to subrogate the sureties, if and when they paid the creditor.

The case at bar is unique in that it is the only case we have found in which a trustee in bankruptcy has opposed amendment by a surety to comply with Sec. 57 (i) where it has paid creditors after the filing of a petition in bankruptcy involving the principal; and if petitioner's position in opposition to amendment should prevail, the case would stand alone.

CONCLUSION

For reasons stated the petition for certiorari should be denied.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1959

No. 671

THOMAS J. FITZGERALD, Trustee in Bankruptcy,
PETITIONER,

v.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, RESPONDENT.

In the Matter of
MIDYETT AND MAY CONSTRUCTION COMPANY, a partnership, consisting of Horace Leon Midyett and Ruel Farries May, Bankrupt.

REPLY TO BRIEF FOR THE RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTION PRESENTED

Respondent characterizes the question presented by its attempted "amendment" as being merely whether the name of a principal creditor may be inserted in place of the name of the Surety. That is not the problem. It is not merely a question of "names", for the "amendment" sought here also requires a change in legal theory, facts relied on, evidence required, and defenses available.

CHANGE OF CLAIM

As already indicated in the first full paragraph on page 9 of the Petition, Petitioner has no quarrel with the rule of law announced by the authorities cited on page 4 of the Brief in Opposition. It will be seen, however, that what those cases involved was the utilization of a different legal theory *based on the same facts*. Those cases cannot be authority here, for Respondent seeks to introduce by "amendment" a new transaction; i.e., a new set of facts. The facts at first relied upon by the Surety were its payments to the principal creditors of the Bankrupt. The facts it now seeks to introduce and rely upon concern the separate occasions on which workmen, materialmen and subcontractors rendered services and delivered goods to the Bankrupt.

If Respondent means to imply in the last paragraph on page 4 of the Brief in Opposition that the Surety's initial claim was sufficient to comply with Section 57i, he is in error. The facts only support the Surety's claim for indemnity, not the principal creditors' claims for goods and services. For instance, the claim does not even purport to set forth the consideration for the principal creditors' claims, as required by the Act. See *3 Collier on Bankruptcy*, Par. 57.03, p. 125 (14th Ed. 1941). Instead, the Surety relies on the written Indemnity Agreement, a consideration wholly foreign to a claim by subrogation. (R.3).

CONFLICT IN CIRCUITS

Petitioner does not rely on *Glint Factors, Inc. v. Schnapp*, 126 F. 2d 207 (2d Cir. 1942) as being *contra* to the decision below, but merely cites it to show the limits of the rule of liberal amendment.

Respondent attempts to distinguish *Matter of G. L. Miller & Co. Inc.*, 45 F. 2d 115 (2d Cir. 1930) on the ground that the court there said it was unnecessary to consider

whether the surety's amended claim might set forth the names and amounts due to the bankrupt's principal creditors. The *Miller* opinion itself discloses that the *reason* why it was unnecessary so to decide was because the claim which the Surety sought to assert by amendment was not a claim in the name and right of the bankrupt's principal creditors, as the first had been, but rather was a direct claim on an indemnity agreement between the bankrupt and the surety. In the court's own words (45 F. 2d at 116):

> "Under Section 57i of the Bankruptcy Act (11 USCA Sec. 93 (i), if such bondholders failed to prove their claims, the appellant as guarantor of the bonds was entitled to make proof in the names of the bondholders. The original petition set forth neither their names nor the amounts due them. Whether such facts could be added by amendment after expiration of the statutory six months for proving claims, we need not now consider, because the proposed amendment, refusal of which is the sole error assigned, contains no reference to any such indebtedness; nor is any contention presented that appellant should have been permitted to make proof in the right of any guaranteed bondholder.
>
> "The indebtedness asserted in the proposed amendment is based upon a written agreement made in May, 1925, by which the bankrupt agreed to indemnify appellant against expense or liability it might incur by issuing bonds or guaranties at the request of the bankrupt."

Respondent has misinterpreted *In re Boggs-Rice Co. Inc.*, 4 F. Supp. 432, rev'd on other grounds, 66 F. 2d 855 (4th Cir. 1933). There, an endorser of the bankrupt corporation's promissory note filed a claim in his own name. The court correctly pointed out that under Section 57i the endorser might claim in the payee's name if the payee did not. The court further noted (4 F. Supp. at 436):

> "An indorser on a note made by a bankrupt, unless the indorser has paid the note, cannot in his own name file

> a proof of claim. Until the indorser has paid the note, it is the payee who has the provable claim, and the claim of the indorser is contingent."

The significant fact in *Boggs-Rice*, as expressly found by the court, was (4 F. Supp. at 436):

> "That either of these notes has been paid does not appear."

Evidently influenced by the thought that since there was no payment, there could be no indemnity, the court construed the claim as being the same throughout. Thus, there was no ruling that one might change from the claim of the principal creditor (the payee) to a claim of indemnity (as endorser). Since the claim was the same, substituting the name of the payee therein merely corrected what amounted to a clerical error, a situation well within the scope of the rule permitting amendment.

In re Salvator Brewing Co., 193 Fed. 989 (2d Cir. 1912) is not helpful to Respondent as a precedent in this case. It is clear from the opinion of the Circuit Court and from the opinion of the District Court (*In re Salvator Brewing Co.*, 188 Fed. 522, S.D.N.Y. 1911) that no question as to Section 57i was raised. The controversy in the case was entirely on two points; (1) whether one of the endorsers could prove a claim as agent of all, and (2) whether any claim could be filed after one year following the adjudication in bankruptcy. The Circuit Court held affirmatively on the above questions, relying heavily as to the second point on the discretion of the District Judge, and on the ground that the claim was timely under the then provision authorizing a claim within one year of its liquidation by litigation. Because testimony in the former proceedings amounted to a substantial proof of claim (and no question was raised as to whether it was the same claim as later asserted) the allowance of

an amendment was consistent with the rule of *Hutchinson v. Otis, Wilcox & Co.*, 190 U.S. 552, 23 S.Ct. 778 (1903).

Similarly, *Insley v. Garside*, 121 Fed. 699, modified, 123 Fed. 78 (9th Cir. 1903) has little or no precedent value to Respondent. The "new claim" question, as affected by Section 57i was not raised, argued, or discussed in *Insley*. If, however, *Boggs-Rice*, *Salvator Brewing* or *Insley* should be considered consistent with the decision below, it further illustrates and buttresses Petitioner's contention that there is a conflict among the various circuits, and is a question upon which this Court should rule.

The bulk of Respondent's argument has been addressed to the merits of this case. Petitioner's failure to deal at length with every contention, conclusion and implication relating thereto should not be taken as an indication of weakness on the principal point. There is much to be said on Petitioner's behalf, and much to recommend a definitive decision by this Court. Such a decision, however, requires a full hearing, and ought not in effect to be made by letting the matter go by default.

Respectfully submitted,

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